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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 270.

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE.

Reply Brief on Motion to Construe or Amend Mandate.

ALFRED T. DAVISON,
Counsel for Petitioner.

ORRIN G. JUDD,
ALFRED T. DAVISON,
Of Counsel.

Appeal Printing Co., 22 Thames St., N. Y. - WOrth 2-3242

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Respondents.

Reply Brief on Motion to Construe or Amend Mandate.

Certain errors in respondents' brief should be corrected:

1. *St. Louis & San Francisco R. Co.* v. *Spiller*, 275 U. S. 156, does not indicate any restrictions on this court's power to amend its mandate during the term. Its holding is that clerical errors may be corrected even *after* the expiration of the term at which the judgment was entered.

2. This motion is not, as contended by respondents, a motion for rehearing. The opinion of this court gave no directions as to costs, the first provision appearing in the mandate. This motion was made as promptly as possible after the filing of the mandate and the attempt by respondents to construe it as including over $10,000 of costs which had not previously been so much as mentioned.

Since this court's decision does not justify the allowance of costs to respondents in the Circuit Court of Appeals, it is

proper now to make clear that the mandate was intended so to provide.

3. Respondents are mistaken in suggesting (brief, p. 3) that the Circuit Court of Appeals reversed on the third ground that recovery for omissions and substitutions "was limited to the extent that they diminished the value of the building." Only two grounds of reversal appear in the Circuit Court of Appeals' opinion, namely, (1) the allowance of interest, insurance and taxes, and (2) the exclusion of evidence of waiver.

The claim that there was insufficient proof of diminution in value of the building by the omissions and substitutions was made by respondents in the Circuit Court of Appeals, and not included in that court's grounds of reversal.

The claim was first brought into this court by respondents (their brief on certiorari, pp. 35-37), but without any assertion that it had been sustained by the Circuit Court of Appeals. Since a respondent may urge any argument, even one rejected below, to support a judgment sought to be reversed, petitioner felt called on to answer the argument in its reply brief.

The claim is now made for the first time, as a reason for now allowing respondents their costs in the Circuit Court of Appeals, that that court had inferentially sustained their position with respect to proof of damages by omissions and substitutions. Since respondents (brief, p. 3) now claim that their new interpretation of the Circuit Court of Appeals' opinion has some support in the final paragraph of this court's opinion, the decision on this motion may appropriately make clear also that this court did not intend to construe the Circuit Court of Appeals' opinion as being contrary to the District Court's ruling on recovery for omissions and substitutions.

4. *Jennings* v. *Burton*, 177 Fed. 603, does not hold, as respondents allege, that costs may not be directed to abide the event. It simply holds that, if they have been awarded absolutely, they cannot be taxed later as a disbursement by the successful plaintiff.

5. We are not aware of the basis for the statement that respondents requested petitioner to waive the furnishing of a supersedeas bond.

Dated, April 4, 1936.

Respectfully submitted,

ALFRED T. DAVISON,
Counsel for Petitioner.

ALFRED T. DAVISON,
ORRIN G. JUDD,
Of Counsel.